



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 893 OF 2013

JONAH KIMANI NGERE CLAIMANT

VERSUS

GEAR CONTROLS & EQUIPMENT LTD. RESPONDENT

Claimant in person

M/S Nyobedo for Respondent

JUDGMENT

1. The Claimant filed a memorandum of claim dated 13th June 2013 on the same day seeking payment of terminal benefits outlined in the particulars of claim and in addition compensation for wrongful and unfair dismissal.

Particulars of claim

2. The Claimant states that he was employed by the Respondent company whose Managing Director was his nephew on 9th January 1998 as a driver at a monthly salary of Kshs.14,200/=. That his work was mainly to take the Director's children to school and to perform various errands as directed by **Mr. Irungu Wanyoike** and his wife, the co-director of the company.

As a matter of fact, the Claimant was the uncle to Mrs Winnie Irungu.

3. The Claimant alleges that he worked continuously in that capacity until the 1st October 2012 when the Respondent wrongfully and unlawfully terminated his employment.

In his testimony before Court the Claimant said that he was not given a letter of appointment and was paid cash every end of the month and at times was paid in instalments.

That he was not granted leave except when he fell sick.

That on 26th September 2012, Mr. Irungu asked him to repair his car but he was unable to do it as he was not a mechanic.

4. Mr. Irungu, asked him to go and bring a mechanic who then repaired the car. Mr. Irungu refused to pay the mechanic his fees of Kshs.1,000 and asked the Claimant to pay. Mr. Irungu however, paid and

deducted the money from the Claimant's salary on the pay day.

5. The Claimant objected to the deduction stating that the mechanic did not repair his car but that of Mr. Irungu. Mr. Irungu told him that he was stubborn and sent the Claimant home and asked the Claimant to write a letter explaining why he was not doing his work properly.

6. The Claimant went home and came back on 1st October 2012. Mr. Irungu dismissed him and told him to go and report to whomever the Claimant desired.

The Claimant was not given a letter of dismissal.

The Claimant was not paid any terminal benefits upon dismissal. That he was not registered with the National Social Security Fund (NSSF) and therefore did not earn any pension inspite of working for 14 years and 9 months for the Respondent.

7. During the tenure of his work for the Respondent he rented a house at Kshs.3,000/= per month at Huruma and used to commute to Langata, the work place. He was not paid House allowance. He was also not registered with the National Hospital Insurance Fund.

8. He said under cross-examination that Mr. Irungu told him that his dog had more brains than the claimant for failing to repair his car.

It was put to him that he was never employed by the Respondent at all but insisted on his version of the story.

9. The Claimant called one **Bedan Kimathi** in support of his case.

Mr. Kimathi told the Court that he worked for the Respondent from 21st July 1988 upto 1st December 2003 in the position of a Manager/Electrician initially but was later promoted to the position of Administrator. He said that the Respondent did not give its employees letters of appointment including himself. That they were not given payslips but were paid cash and signed petty cash vouchers.

10. The witness told the Court that the Claimant was employed by the Respondent as a driver in 1989 and relieved him some of the work he was doing since he was also a driver and made deliveries upon sales of products, and solicited for tenders.

The witness told the Court that when he left the employment of the Respondent he left the Claimant still working for the Respondent. The company dealt in Electrical equipment.

The witness withstood cross-examination well and his evidence by and large appeared credible and corroborated the version told by the Claimant on the material facts of employment by the respondent.

Respondent's case

11. In its memorandum of Response dated 24th June 2013 and filed on 25th June 2013, the Respondent denies in total that it ever employed the claimant as a driver or at all.

The Respondent therefore denies in total all the particulars of claim and the relief sought by the Claimant in the memorandum of claim.

12. The Respondent called Mr. Irungu Wanyoike, the Managing Director of the Respondent in support of its case.

The witness told the Court that the Respondent became operational in 1983 and that he knows the Claimant, who is an uncle to his wife.

13. He told the Court that the Respondent never employed the Claimant as a driver. The witness however admitted contrary to the averments in the memorandum of Response that the Claimant worked for the Respondent from time to time and on a casual basis.

14. That the Claimant was sent on various errands as he lived near the offices of the Respondent at Karen. That he made deliveries from time to time to assist the official driver Mr. Dedan Kimathi, who testified in support of the claimant's case.

14. The witness denied that he wrongfully and unlawfully dismissed the Claimant from work and also denied that Respondent owes the Claimant the amounts claimed or at all. The witness instead told the Court that the claimant should be grateful as he was merely helping him by providing him with work and income on a casual basis.

15 Under cross-examination, he denied that the Claimant used to take his children to school or make other errands enumerated by the claimant. He however sent him to several places many times. He also denied that he abused the Claimant before dismissing him from work.

16. The witness during re-examination contradicted his earlier testimony by admitting that the Claimant used to pick his children from school and did many errands connected to the Respondent's business and family matters.

Both parties made oral submissions at the close of the case.

Determination

17. The Claimant adduced credible testimony that was corroborated by Mr. Dedan Kimathi to the effect that he was employed by the Respondent as a driver in 1998.

18. Mr. Kimathi told the Court that when he left the employment of the Respondent in 2003, the Claimant was still employed as a driver by the Respondent.

The Claimant told the Court that he worked for the Respondent for a period of fourteen (14) years and nine (9) months.

19. The Respondent initially in the memorandum of response and in RWI's testimony in chief denied that the Claimant was ever employed by the Respondent.

20. RWI however later contradicted this position by admitting that the Claimant was employed by the respondent, but as a casual. The witness further admitted that the Claimant worked as a driver and picked his children from school in addition to doing various duties related to the business of the Respondent.

21. It is the Court's considered view that the Claimant has on a balance of probabilities proved that he was employed by the Respondent for a continuous period of 14 years and 9 months.

22. That he was never registered with NSSF and therefore upon termination he was entitled to payment of service gratuity by the Respondent in terms of **Section 35(5)** as read with **Section 35(6)** of the **Employment Act, 2007** which provides:

“An employee whose contract of service has been terminated under Subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.”

“(b) This Section shall not apply where an employee is a member of;

(d) the National Social Security Fund.”

23. Since the Respondent did not fix nor pay the gratuity. The Court shall be guided by the provisions of

Section 40(g) of the **Employment Act, 2007**, which provides that an employee declared redundant shall be paid severance pay at the rate of not less than 15 days pay for each completed year of service.

24. Though the claimant was not dismissed from work for operational reasons, the Court finds this rate to be reasonable for the purpose of determining gratuity payable to an employee who has been dismissed as in the case of the Claimant.

25. The Claimant was not accorded opportunity to explain in terms of **Section 41(1) & (2)** of the **Employment Act**, why his services should not be terminated.

The termination was summarily done without following a fair procedure.

26. The conduct by the Respondent violated **Section 45(1)** of the employment act which provides;

“No employer shall terminate the employment of an employee unfairly.”

27. It is the Court’s view that the termination was unlawful, as it was not for a valid reason and the same was unfair as it was done summarily and without any notice and without giving the Claimant a chance to explain himself.

This is contrary to **Section 45(2)(a)** and **(c)** and entitles the Claimant to compensation in terms of **Section 49(1)(c)** of the **Employment Act**.

28. The Court finds that the claim for payment in lieu of leave days has not been sufficiently proved because no letter was produced by the Claimant applying to go on leave or complaining that he had been denied leave by the Respondent.

29. It is evident from the testimony by the claimant that he was not given any notice and therefore is entitled to payment in lieu of one month notice which is the minimum standard provided by the **Employment Act**.

30. The defence by the Respondent is rejected by the Court as untruthful and insufficient to rebut the case put forth by the Claimant.

31. Accordingly the Court awards the claimant as against the Respondent as follows;

a. payment of Kshs.14,200/=; being one month’s salary in lieu of notice.;

b. payment of Kshs.99,000/= being service gratuity calculated at 15 days salary for the 14 years served by the Claimant; and

c. six months’ salary in the sum of Kshs.85,200/= being compensation for the unlawful and unfair dismissal from employment;

Total award Kshs.198,800/=;

d. the award is payable with interest at Court rates from date of the Judgment till payment in full;

e. costs of the suit.

Dated and Delivered at Nairobi this 8th day of October, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE